STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION February 11, 2014
v	No. 314980 Genesee Circuit Court
MANTREASE DATRELL SMART, Defendant-Appellee.	LC No. 11-029652-FC Advance Sheets Version

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

WILDER, J., (*dissenting*).

The prosecution appeals by leave granted[1] the trial court's order granting defendant's motion to suppress. The order suppresses statements made by defendant on March 15, 2011, and June 8, 2011. In its brief on appeal, the prosecution concedes as it did below that defendant's March 15, 2011 statement is inadmissible under MRE 410(4) as a statement made during plea discussions. However, the prosecution continues to assert that defendant's June 8, 2011 statement should not be suppressed under the dictates of MRE 410(4). The prosecution also argues that defendant did not have a right to *Miranda*[2] warnings when he gave his June 8, 2011 statement, and that the statement should also not be suppressed because of a failure to provide *Miranda* warnings. The majority concludes that the trial court properly suppressed defendant's June 8, 2011 statement in conformance with MRE 410(4), and affirms the trial court's order on that basis.[3] I respectfully dissent.

[1] See *People v Smart*, unpublished order of the Court of Appeals, entered March 27, 2013 (Docket No. 314980).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] The majority found it unnecessary to address defendant's claim that his *Miranda* rights were violated in light of its conclusion that the statements were properly suppressed under MRE 410(4).

I

In this case charging defendant with felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, defendant seeks to prevent the use as evidence against him of statements he made in an effort to obtain a plea agreement in a separate, unrelated case in which he was charged with carjacking, MCL 750.529a, armed robbery, MCL 750.529, felony-firearm, MCL 750.227b, and conspiracy to commit armed robbery, MCL 750.157a. Defendant successfully obtained an order suppressing his statements following an evidentiary hearing conducted by the trial court on April 11, 2012, and April 12, 2012. The evidence adduced at the hearing established the following.

On June 10, 2010, defendant was arrested in connection with a carjacking case and taken into custody. At the beginning of 2011, defendant informed his attorney that he was interested in providing information he knew about a homicide to the prosecution in exchange for a plea deal in his carjacking case. As a result of defendant's instructions, defendant's attorney contacted Richmond Riggs, the managing assistant prosecuting attorney in the Genesee County Prosecutor's Office. Defense counsel told Riggs that her client had witnessed a homicide and was interested in a plea deal in his carjacking case in exchange for giving the prosecutor the information he had about the homicide. Because defense counsel was concerned that defendant could be subject to additional criminal charges because he was purportedly dealing drugs when he witnessed the homicide, defense counsel sought assurances from Riggs that anything defendant said in the interview would not be used against him. Riggs agreed to this condition because he had no indication based on what defense counsel had told him that defendant was in any way involved in the homicide. However, Riggs testified that, pursuant to office policy, in advance of his statements, no blanket promise was made to defendant that he would not be charged with the homicide if it were later determined defendant was involved in some way.

Riggs contacted Sergeant Mitch Brown, the officer in charge of the May 31, 2010 homicide of Megan Kreuzer. After some conversations between defense counsel, Riggs, and Brown, it was confirmed that defendant was claiming to have witnessed Kreuzer's homicide. After verifying that defendant still wanted to talk, defense counsel contacted Riggs again and reconfirmed that anything defendant said in the interview would not be used against him. Riggs then instructed Brown to meet with defendant to see what he knew about the Kreuzer homicide and to get a statement if possible.

Brown first met with defendant and defense counsel on March 15, 2011. At this meeting, Brown did not advise defendant of his *Miranda* rights, but subsequently explained that he had told defendant that he was not a suspect in the homicide case and was not in custody for that offense because defense counsel had told Brown that defendant was just an eyewitness. Defendant gave his initial statement to Brown, and Brown told defendant that, in his view, defendant's story did not make sense. To defense counsel's surprise, defendant then implicated himself in the murder by admitting that he had supplied the weapon used in the murder. Brown then told defendant that he could be charged with the homicide if he was involved, and that this charging decision was up to the prosecutor, and chastised him for not being honest with his attorney. Defendant admitted that he had not been completely truthful with defense counsel before the interview. Brown left the interrogation room so that defendant and defense counsel

could talk privately. After speaking with defendant, defense counsel spoke privately with Brown, who informed defense counsel that one of the murder suspects, Jamario Mays, wanted to cooperate with police and provide information about the homicide. Brown speculated that defendant's statement might not be of much use to the prosecution if Mays was cooperative.

Brown and defense counsel returned to the interrogation room to continue the interview, and defense counsel indicated the interview should stop if defendant were to further implicate himself. Defendant then told Brown that he had received a phone call from Mays and Anthony Michael, who were looking for a gun. Defendant said he had told them he had a handgun and an AK-47 assault rifle, and that they had decided to buy the AK-47 from defendant. They made plans for defendant to bring the weapon over to Mays's house, and Mays, Michael, and Mays's sister were at the house when defendant arrived. Both Mays and Michael handled the rifle.

Defendant told Brown that after the sale, he left to go to a house on Dartmouth Street. At some point, he received a phone call from someone who wanted to buy crack cocaine, so he walked to a party store nearby to sell the crack. Before he left or while he was walking, defendant received a call from Mays. They agreed that in exchange for the AK-47, Mays would give defendant a quarter pound of marijuana that defendant would sell for $400, of which he would keep $350 and give Mays $50. Defendant continued walking to sell the crack and ran into Mays and Michael, who told defendant that they were going to rob someone. Mays showed defendant a sawed-off shotgun in his shirt sleeve but said it was not loaded. Defendant asked why they needed a weapon from him if they already had a weapon, and then observed a car pull up and Mays walk up to the passenger side. Michael approached the driver's side. Someone said "give it up," and Michael pointed the AK-47 at the car's occupants. Then defendant heard pops and saw that shots were fired. The car sped away. Michael tried to give him the AK-47 back, but because defendant had seen a state police vehicle in the area, he refused to take it.

Consistently with his usual practice during an interview, Brown took notes on preliminary information about defendant's education and health status—to be certain defendant was sufficiently coherent to participate in the interview—and he took extensive notes about his conversation with defendant. Defendant reviewed the notes, made corrections to them, and signed them. Brown then faxed his notes to Riggs, who instructed Brown to speak with Mays to see if the stories were consistent. Brown testified that he was aware plea discussions were occurring at the time, but he never sat down with defense counsel and Riggs when they were discussing a plea agreement.

After his March 15, 2011 interview with Brown, defendant was offered a plea agreement in the carjacking case. Defendant agreed to plead guilty to unarmed robbery and felony-firearm in exchange for the prosecution's agreement to drop all other charges. As part of the plea agreement, defendant also agreed to testify truthfully and consistently with the statement he made to Brown regarding the Kreuzer homicide. On May 12, 2011, the prosecution signed a

written plea agreement conforming to the terms agreed to by defendant. Defendant and defense counsel signed it on May 23, 2011.[4]

After the plea agreement was signed but before defendant appeared in court to formally plead guilty and place the agreement on the record, at defendant's request, defense counsel contacted Brown directly for a second meeting with defendant. Defense counsel testified that defendant had become concerned about the two years he would have to serve on the felony-firearm count he had agreed to plead guilty to, and that he had expressed doubt about whether she had actually negotiated with the prosecution to get the best deal available. Both Brown and defense counsel understood from the prosecutor's office that the plea agreement would not be changed. Defense counsel told Brown that defendant thought he should have a better deal and she urged Brown to tell defendant that his plea deal was not going to get better. The prosecutor's office agreed that, as defense counsel had requested, Brown should meet with defendant. The prosecutor's office viewed the meeting only as an opportunity to get more information on the homicide, if possible. Brown met with defendant on June 8, 2011, and once again he did not advise defendant of his *Miranda* rights. As requested by defense counsel and consistently with his own understanding, Brown told defendant that, based on what he understood from the prosecutor's office, he did not think the plea deal was going to get better. Brown also told defendant that the prosecutor's office, and not Brown, would decide what plea deals to offer, so defendant could "take it or leave it."

According to Brown, he and defendant then began talking about the night Kreuzer was killed, and defendant told him that he had not been totally honest about what had happened that night. Defendant then gave another statement in which he admitted that when he brought the gun over to Mays's home, Mays and Michael were talking about committing a robbery, so he knew that was their plan. Defendant did not go to the house on Dartmouth. He stayed at Mays's house and walked with Mays and Michael down the street to the meeting with Kreuzer. Defendant went because he did not think they would go through with the robbery and he wanted to see if they actually would. Brown asked defendant if he told Mays and Michael that he was going to take back the gun when he found out that they planned to commit a robbery. Defendant said he did not. Brown had defendant read over his notes and defendant signed them. These notes were not as extensive and did not include his usual information concerning defendant's ability to comprehend, because he had not anticipated conducting an interview when he went to meet with defendant. Brown reiterated to defendant that he had no discretion concerning plea negotiations, and that he would give this new information to the prosecutor.

Brown testified that he had interviewed Mays and Michael before his second meeting with defendant. From his interview with Mays, Brown knew before meeting with defendant that when Mays and Michael left Mays's house to go meet with Kreuzer and commit the robbery, defendant left Mays's house with them. The trial court asked Brown:

The Court: That didn't make [defendant] a suspect in your eyes?

[4] The written plea agreement was not included in the record on appeal.

[*Brown*]: Well, I gave the information to the Prosecutor's Office. And, like I said, I thought he could be charged in the crime. But we -- but he wasn't -- but he wasn't charged and he wasn't the person that pulled the trigger. The information we had was that it was Anthony Michael, and that was what he had indicated that he was willing to testify on.

* * *

The Court: From Day One that you met with him until the end, he wanted a better plea deal?

[*Brown*]: That's correct.

The Court: And even when he was on the stand and refused to testify because he didn't get a good plea deal?

[*Brown*]: According to him. That's correct.

Defendant testified that Brown had told him he would not be charged in connection with the homicide because they wanted the guy who did it, not him. Defendant was not sure if Brown said that during the first or second interview. Defendant thought that the only way he would be charged was if he lied or changed his story on the witness stand.

On June 9, 2011, defendant pleaded guilty to unarmed robbery and felony-firearm in the carjacking case. While the plea was given in general accord with the written plea agreement, in which all other charges were to be dismissed, defense counsel and the prosecutor also agreed on the record that defendant would not be charged in the Kreuzer homicide if he continued to cooperate and testified truthfully and consistently with the statements he had already made. Although nothing in the plea agreement expressly stated that defendant would not be charged with murder, the prosecutor and defense counsel confirmed their understanding that this provision was one of the agreed-upon outcomes of the plea negotiations. In addition, because there was no sentence agreement contained in the plea agreement, the trial court also informed defendant when accepting his plea that the sentence imposed would be determined at the discretion of the court.

On June 30, 2011, despite being warned that he could be charged with homicide if he failed to comply with the plea agreement he had signed on May 23, 2011, defendant refused to testify against Michael during Michael's preliminary examination.

II

I believe there are two issues presented on appeal as it concerns the trial court's order suppressing defendant's June 8, 2011 statement: (1) whether the June 8, 2011 statement may be suppressed under MRE 410(4), and (2) whether defendant was entitled to *Miranda* warnings.

A

"This Court reviews de novo the trial court's ultimate ruling on the defendant's motion to suppress." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008). If this Court's "inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo." *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). The trial court's findings of fact at a suppression hearing are reviewed for clear error, *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009), and will only be disturbed if this Court is left with "a definite and firm conviction that a mistake was made." *Brown*, 279 Mich App at 127. But the application of those facts to the relevant law is reviewed de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013); *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996).

In construing the rules of evidence, this Court applies "the legal principles that govern the construction and application of statutes. When the language of an evidentiary rule is unambiguous, we apply the plain meaning of the text without further judicial construction or interpretation." *Craig v Oakwood Hosp*, 471 Mich 67, 78; 684 NW2d 296 (2004) (citations and quotation marks omitted).

B

Rule 410 of the Michigan Rules of Evidence provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

In light of the facts developed in the suppression hearing, I would conclude that the June 8, 2011 statement did not occur in the course of plea negotiations with an attorney for the prosecuting authority.

1

In *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996), this Court held that when the facts establish that "no prosecuting attorney was present at the time defendant made his incriminating statements to the police," MRE 410(4) as amended "is simply inapplicable."[5] The undisputed record in this case establishes that defendant made his statements

[5] *Hannold*'s conclusion is consistent with our Supreme Court's holding in *People v Williams*, 475 Mich 245, 255-256; 716 NW2d 208 (2006), that "[a]lthough investigating police officers

only in the presence of his defense attorney and Sergeant Brown. Thus, were we to do nothing more than apply the binding holding in *Hannold* to the facts of this case without further analysis, at a minimum, we would be compelled to conclude that the trial court erred by suppressing defendant's statement under MRE 410 because no prosecuting attorney was present at the time of the statement.

2

However, as is highlighted by the prosecution's concession that defendant's March 15, 2011 statement is properly suppressed, *Hannold* as written is not easily applied to the facts of this case. In my view, *Hannold* errs by stating as a blanket rule of law that the physical presence of a prosecuting attorney is required in order for MRE 410(4) to be applicable.

a

The plain language of MRE 410(4), "[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority," is unambiguous. See *Craig*, 471 Mich at 78 (stating that when the language of an evidentiary rule is unambiguous courts must apply the plain meaning without further construction or interpretation). The phrase "in the course of" means "in the process of, during the progress of." I *Oxford English Dictionary* (compact ed., 1971), p 1088. Given this unambiguous meaning, the phrase "in the course of" does *not* and cannot also solely mean "in the presence of." Therefore, under the plain language of the rule, only a statement made by a defendant in the progress or process of plea discussions with an attorney for the prosecuting authority would be excluded from admission into evidence. The fact that an attorney for the prosecuting authority is not present when the statement is made is not dispositive as to the question whether MRE 410(4) is applicable.

In my judgment, defendant's March 15, 2011 statement was made in the progress or process of plea discussions with an attorney for the prosecuting authority as conceded by the prosecution, and as argued by the prosecution, defendant's June 8, 2011 statement was not. Before defendant's March 15, 2011 statement, defense counsel and Riggs had extensive discussions about the conditions under which defendant would give his statement; defense counsel expressly sought from the prosecutor a reduction in charges in the carjacking case, and an agreement that defendant's statements to Brown about the homicide would not be used against him. Before defendant's June 8, 2011 statement, defense counsel's negotiations with Riggs resulted in a signed a plea agreement in the carjacking case. The signing of the plea agreement by defendant and the prosecutor necessarily evidences that plea negotiations in the carjacking case were completed. See *Meece v Commonwealth*, 348 SW3d 627, 650 (Ky, 2011) (stating that plea negotiations ended after the defendant signed the agreement and before he made any statement, so the statement was not made in the course of plea discussions).

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may and do cooperate with the prosecutor, they are not part of the prosecutor's office." Nor are they agents of the prosecutor such that knowledge by the police should be imputed to the prosecutor. *Id*. at 256.

Significantly, however, when defendant wished to seek a "better deal" than the one he had already agreed to, defense counsel did *not* call Riggs in an effort to reopen negotiations in the carjacking case. Rather, to initiate the opportunity to make a second statement, defense counsel instead called Brown, who had never been a party to the plea negotiations. The record shows that the prosecution, defense counsel, and Brown all understood that the prosecution had no intention to revise its written agreement with defendant. After being informed by Brown of defense counsel's request for Brown to meet again with defendant, Riggs agreed that Brown should talk to defendant a second time solely to obtain additional information about the Kreuzer homicide.[6] Neither Riggs nor defense counsel engaged in any discussions to the contrary, and the fact that the plea deal would not get any better was made clear to defendant by Brown at the outset of the second interview—before defendant made any statements. Thus, the uncontradicted evidence is that defendant's June 8, 2011 statement did not occur while in the progress or process of plea negotiations with the prosecuting authority.[7]

In this regard, the facts of this case are similar to the facts in *Hutto v Ross*, 429 US 28, 28-30; 97 S Ct 202; 50 L Ed 2d 194 (1976). In that case, the defendant entered into a plea agreement with the prosecuting attorney by which the defendant would plead guilty to the charge of embezzlement in exchange for the prosecutor's recommendation that the defendant be given a 15-year sentence, with 10 years of the sentence to be suspended. Subsequently, the prosecutor asked the defendant to make a statement concerning the crime. Although defense counsel advised the defendant against making the statement, on the basis that the already negotiated plea agreement was enforceable regardless of the defendant's willingness to make the statement being requested, the defendant accommodated the prosecutor and made a statement confessing to the embezzlement. The defendant later decided to withdraw the plea, hired new counsel, and proceeded to trial. The prosecutor sought admission of the defendant's statement at trial, and following an evidentiary hearing outside of the presence of the jury, the trial court allowed admission of the statement. The defendant was convicted and sentenced to 21 years'

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[6] I disagree with the majority's conclusion that the fact that Brown told defendant that the prosecution would be "very interested" in the content of the second interview indicates that plea discussions were in progress at that time. While Riggs agreed that Brown should attempt to obtain additional information about the Kreuzer homicide from defendant, no promises were made by Riggs or Brown to defendant for that information and defendant did not provide it conditionally.

[7] The June 9, 2011 "tweaks" referred to by the majority do not indicate that plea discussions were still in progress on June 8, 2011. Although defense counsel and the trial court used the word "tweaks" when referring to the promise that defendant would not be charged in the Kreuzer homicide and the fact that the sentence would be chosen by the trial court, not the prosecutor, the plea agreement did not change. As the record demonstrated, that defendant would not be charged in the Kreuzer homicide because of his cooperation was understood by counsel to be a part of the plea agreement, even though this understanding was not memorialized in writing. Similarly, that the trial court would impose a sentence of its choice, "not the Prosecutor's choice," did not constitute a change in the agreement. The plea agreement never contained a sentencing provision.

imprisonment. On appeal, the United States Supreme Court held that because the defendant's statement was not made during the plea negotiation process, was not the result of an express or implied promise involving the plea or any coercion on the part of the prosecution, and was not involuntary, the statement was properly admitted at trial.

For these reasons, MRE 410(4) does not bar admission of defendant's June 8, 2011 statement to Brown.

b

Because the plain language of MRE 410(4) as amended is unambiguous and easily applied to the facts of a case in an objective fashion, I further contend that the majority errs, as did *Hannold*, as a matter of law in applying the two-tiered, "reasonable expectations" analysis enunciated in *People v Dunn*, 446 Mich 409, 415-416; 521 NW2d 255 (1994), to determine whether defendant's statements were properly suppressed.

The defendant in *Dunn* made his statements to the police before the substantial 1991 amendment of MRE 410. At that time, the rule provided:

> Inadmissibility of Pleas, Offers of Pleas, and Related Statements.
>
> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement. [*Dunn*, 446 Mich at 414 n 14, citing MRE 410, as adopted March 1, 1978.]

The reasonable expectations standard—whether a defendant had a "subjective expectation to negotiate a plea at the time of the discussion," and whether that expectation was reasonable given the totality of the objective circumstances—was not derived from the plain language of the earlier version of MRE 410. Rather, *Dunn* incorporated the two-tiered analysis construing the similar but not identical FRE 410, which was adopted by the Fifth Circuit Court of Appeals in *United States v Robertson*, 582 F2d 1356, 1366 (CA 5, 1978). In contract law, our Supreme Court has rejected an interpretive approach in which "judges divine the parties' reasonable expectations" rather than interpret the plain language of the parties' agreement. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Similarly here, I would conclude that the plain language of MRE 410(4), and not defendant's expectations, should govern the outcome in this case. See *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 479; 838 NW2d 736, 745 (2013). Because the prosecuting authority had concluded its negotiations with defendant with the signing of a plea agreement, defendant's June 8, 2011 statement to Brown should not be construed as having occurred "in the course of plea discussions with an

attorney for the prosecuting authority," regardless of what defendant claims his expectations were.

C

In its opinion, the majority states that it declines to consider whether and how the amendment of MRE 410 applies to the facts in this case, giving four reasons for that decision: (1) the prosecution's argument—that MRE 410 does not apply in this case because, there being no prosecuting attorney present during the June 8 statement, defendant could not have had a reasonable expectation that this meeting would result in further plea negotiations—is abandoned for the reason that the prosecution's briefing on this question was inadequate in that it failed to elaborate on the claim or cite the prior language of MRE 410; (2) because the prosecution inadequately briefed the issue, the majority will not address whether or not there was an attorney for the prosecuting authority present during the June 8, 2011 meeting; (3) the prosecution has foreclosed review of the issue because, given its admission that the March 15, 2011 statement was given in the course of plea discussions with the prosecuting authority even though no prosecutor was present when defendant made the actual statement, it has conceded that for purposes of MRE 410, a prosecuting attorney need not be physically present to hear the statements made; and (4) the precise meaning and application of the phrase "with an attorney for the prosecuting authority" cannot be decided without proper briefing by the parties.[8]

I respectfully disagree with the majority's view that this issue should not be specifically addressed by this Court. When a controlling legal issue is squarely before the Court, "the parties' failure or refusal to offer correct solutions to the issue" places no limits on the "Court's ability to probe for and provide the correct solution." *Mack v Detroit*, 467 Mich 186, 206-207; 649 NW2d 47 (2002). Rather, addressing a controlling legal issue despite the failure of the parties to properly frame it is a well-understood judicial principle. *Id*. at 207. It is beyond dispute that when this Court's "inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo." *Dobek*, 274 Mich App at 93. See also *Cain*, 451 Mich at 503 n 38. Whether the trial court correctly suppressed defendant's June 8, 2011 statement to Brown cannot be properly decided without interpreting MRE 410(4). Thus, this Court's duty is to construe MRE 410(4) and apply it to the facts presented, regardless of the quality of the briefing and argument by the parties.

Moreover, although this Court does not generally address issues not raised by the parties on appeal, *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 560; 840 NW2d 375 (2013), citing *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 4 n 3; 704 NW2d 69 (2005), this Court may properly review "an unpreserved question of law where the facts necessary for its resolution have been presented," *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999). In this case, the record is clear that plea discussions with an attorney for the prosecuting

[8] Despite its stated reticence to interpret MRE 410(4), the majority, nevertheless, goes on to conclude that "it would stand to reason that" the two-tiered, reasonable expectations analysis articulated in *Dunn* necessarily continues to apply under the amended, current version of MRE 410(4).

authority were completed, as signified by the plea agreement signed by the prosecutor on May 12, 2011, and signed by defendant and defense counsel on May 23, 2011, well before defendant's June 8, 2011 interview with Brown. Whether defendant could reinitiate plea discussions with the prosecuting authority solely by communicating with Brown and not engaging in additional discussions with Riggs, and whether under these facts defendant's June 8, 2011 statement to Brown is admissible present questions of law that can and should be answered by analyzing the plain language of MRE 410(4) and applying it to the facts of this case.

D

In summary, because (1) the plea agreement between defendant and the prosecution was completed before the June 8, 2011 interview with Brown, (2) defense counsel made no effort to reengage the prosecution in additional discussions concerning defendant's plea agreement, (3) the evidence is clear that the prosecution agreed that Brown should conduct a second interview with defendant only to see what additional information defendant would reveal about the homicide, and (4) defense counsel and Brown clearly conveyed to defendant that the prosecution would not offer any better plea deal in the carjacking case before he made his second statement, I would find on review de novo that the trial court erred when it found defendant's June 8, 2011 statement occurred "in the course of plea discussions with an attorney for the prosecuting authority," under MRE 410(4). See *Cain*, 451 Mich at 503 n 38.

III

The prosecution also contends that defendant had no right to *Miranda* warnings on June 8, 2011, so the statement should not be suppressed on the basis that he did not receive them. I agree.

A

Whether defendant was subjected to custodial interrogation, and thus entitled to *Miranda* warnings, is a mixed question of law and fact; this Court reviews the trial court's findings of fact for clear error but reviews questions of law de novo. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). A trial court's factual findings will only be disturbed if this Court is left with "a definite and firm conviction that a mistake was made." *Brown*, 279 Mich App at 127.

B

The Fifth Amendment's privilege against self-incrimination requires that a suspect be informed of certain rights before he or she is subject to a custodial interrogation. *Miranda*, 384 US at 444-445; *People v Vaughn*, 291 Mich App 183, 188-189; 804 NW2d 764 (2010); see also US Const, Am V. These *Miranda* warnings include

> the right to remain silent, that anything he [the defendant] says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [*Miranda*, 384 US at 479.]

The general test for determining if an individual is in custody is whether "in light of the objective circumstances of the interrogation, a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Howes v Fields*, 565 US ___, ___; 132 S Ct 1181, 1189; 182 L Ed 2d 17, 27 (2012) (citations and quotation marks omitted; alteration in original). However, an individual's imprisonment, by itself, is not enough to create a custodial environment. *Id.* at ___; 132 S Ct at 1190; 182 L Ed 2d at 28-29. When an individual is already in custody, he or she is not "yanked from familiar surroundings in the outside world and subjected to interrogation in a police station," which may make an individual feel coerced into answering questions. *Id.* at ___; 132 S Ct at 1190-1191; 182 L Ed 2d at 29. In addition, unlike an individual who is not in custody, a prisoner knows that he or she will remain confined after the questioning; the prisoner's cooperation in answering questions will not earn him or her a prompt release. *Id.* at ___; 132 S Ct at 1191; 182 L Ed 2d at 29. Finally, a prisoner who has been convicted and sentenced likely knows that the questioning officers do not have the authority to reduce his sentence. *Id.* at ___; 132 S Ct at 1191; 182 L Ed 2d at 29

To determine whether a prisoner is in custody, a court should consider "the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Id.* at ___; 132 S Ct at 1192; 182 L Ed 2d at 30-31. In *Howes*, 565 US at ___; 132 S Ct at 1192-1194; 182 L Ed 2d at 31-32, the Supreme Court found that the prisoner was not in custody for purposes of *Miranda*, especially given that he was told he was free to end the questioning and return to his cell at any time.

In this case, defendant was not in custody for purposes of *Miranda* when he made the statement on June 8, 2011. Although defendant was in custody on the carjacking case on June 8, 2011, he initiated the second interview concerning Kreuzer's homicide through his attorney in an attempt to obtain a better plea deal, and was not summoned by Brown or the prosecutor. In addition, before defendant made any statements he was informed by Brown that a better plea agreement was not available, that he (Brown) had no authority to negotiate a new agreement, and that the terms of any agreement were within the discretion of the prosecution. Furthermore, defendant's attorney was present throughout the entire meeting.

IV

For all the foregoing reasons, I would reverse.

/s/ Kurtis T. Wilder